Supreme Court, U.S.
FILED
MAY 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1700

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM A. CAPRIOLA, JR. and
BRYN G. CAPRIOLA, h/w,
Petitioners,

v.

B. F. GOODRICH COMPANY,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

James M. Brogan, Esquire
Kevin F. Cox, Esquire
HARVEY, PENNINGTON, HERTING & RENNEISEN, LTD.
1600 Market Street, 12th Floor
Philadelphia, PA 19103
(215) 563-4470
and
Norman S. Carr, Esquire
75 East Market Street
Akron, OH 44308
Attorneys for Respondent

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court and the two Third Circuit Panels err when they permitted the defendant to introduce impeachment evidence of prior inconsistent statements subject to a limiting instruction?

2. Where the record does not demonstrate that the plaintiff raised timely objections, is it error for the Court to hold that the objections were not preserved for appeal?

3. Where the Third Circuit Court of Appeals decides to review a case on the record and briefs alone and not grant oral argument, is the plaintiff denied due process?

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented for Review	i
Table of Authorities	iii
Introduction	1
I. The Trial Court And The Third Circuit Panels Correctly Held That The Evidence Was Admissible For Purposes of Impeachment And The Limiting Instruction Given Was Proper	1
II. The Appellate Court Correctly Ruled That Plaintiff Had Not Preserved Its Fed.R.Evid. 613(a) Argument For Appeal	5
III. The Third Circuit Decision Not To Grant Oral Argument By The Parties Was Well Within The Court's Authority And Discretion, And Was Not A Denial Of Due Process To The Plaintiff	6
Conclusion	9

TABLE OF AUTHORITIES

Cases: Page

Commonwealth v. Brady, 510 Pa. 123, 507 A.2d 66 (1986) 2

United States v. Bolla, 685 F.2d 929 (5th Cir. 1982) 3

United States v. Brown, 692 F.2d 345 (5th Cir. 1982) 3

Other Authorities:

Fed. Proc. Rules Service, Court of Appeals, Third Circuit, Rule 12(6)(a) 7

Federal Rule of Evidence 403 and 613(b) 1, 2

Federal Rule of Evidence 607 1

Federal Rule of Evidence 613 2

Fed.R.Evid. 613(a) 5

Federal Rule of Appellate Procedure 34(a) 6

1 *Weinstein's Evidence*, paragraph 105 [02] (1986) 4, 5

INTRODUCTION

It is important to recognize that the issues presented by the plaintiffs in their Petition have been considered at least two times prior to reaching this Court. In fact, the plaintiffs' argument that Federal Rule of Evidence 607 was violated has been considered three times. Notwithstanding this, the plaintiffs come to the present Court arguing that fairness and justice have not been served. For the same reasons supporting the trial court's decision and two panel decisions by the Third Circuit Court of Appeals, this request should not be granted. The lower courts' decisions were valid, accurate and supported by law. Justice and fairness, in fact, have been served.

I. THE TRIAL COURT AND THE THIRD CIRCUIT PANELS CORRECTLY HELD THAT THE EVIDENCE WAS ADMISSIBLE FOR PURPOSES OF IMPEACHMENT AND THE LIMITING INSTRUCTION GIVEN WAS PROPER.

As in its prior arguments, the plaintiffs attempt to convince this Court that the decisions permitting evidence to be used for purposes of impeachment were violative of the Federal Rules of Evidence. Three judicial bodies carefully considered the issue, yet the plaintiffs claim the lower court and two Third Circuit panels erred.

How forcefully must it be demonstrated to the plaintiffs that the admissibility of the evidence for impeachment purposes was valid? The lower court, actively and intimately involved in all aspects of the matter, ruled the defendant was not attempting to misuse the Federal Rules of Evidence, but rather was validly attempting to impeach on the basis of prior inconsistent statements. The Third Circuit Court of Appeals reviewed both the lower court's decision and the extensive briefs of the parties in great detail and rendered an opinion that

the lower court was correct in admitting the evidence. The court held Federal Rule of Evidence 613 had not been violated and that an adequate and proper limiting instruction to safeguard against any possible prejudice had been given. Upon re-examination by the Third Circuit, this decision was reaffirmed when it held there was no cause to grant reargument.

Notwithstanding the three decisions that the evidence was admissible, the plaintiffs still assert the trial court failed to weigh the evidence in accordance with Federal Rule of Evidence 403 and 613(b). The Third Circuit panel, on two occasions, carefully reviewed the arguments as well as the lower court's ruling regarding the testimony by the Sloads, Weaver and Frye. It was recognized that the trial court and the appellate panel exercised the utmost care in deciding whether the testimony should have been permitted. The Third Circuit even recognized that despite the defendant's correct efforts to introduce the testimony as substantive evidence pursuant to *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986), the lower court, in an abundance of care, only permitted it for impeachment purposes.

The plaintiffs argue the decision of the Court of Appeals is in direct conflict with the decisions of other appellate courts on "identical" issues. Yet each and every case cited by the plaintiffs as supporting their argument was examined by the Court of Appeals, and again by the panel considering the plaintiffs' Petition for Reargument. Each and every case presented by the plaintiffs was distinguished by the defendant to show that they were not controlling of the present litigation. On each occasion the Court of Appeals agreed with the defendants, holding, in essence that the decision did not conflict with prior case law.

The plaintiffs' argument that the trial court failed to conduct a balancing test is entirely without merit. The fact of the matter is the court *did* consider and *did*

conduct a hearing. After the parties presented both written and oral arguments to the trial court, the court retired to chambers while the parties were conducting voir dire and choosing a jury outside. The court then issued a decision with an opinion. That the court did not conduct a full-blown "mini-trial" or issue a formal opinion, titled "balancing statement," is of no moment.

The Third Circuit reviewed the trial court's actions with respect to its balancing and held the proper procedures had been followed:

> The District Court did look at the probative value/prejudicial effect of the proffered "hearsay" evidence. That is how it came to the conclusion that a limiting instruction was necessary. Moreover, despite the assertions of the plaintiffs on appeal, the credibility of all witnesses in court has significant probative value.
>
> Finally, the Rule 104(c) "outside-the-jury" proceeding is only mandated in proceedings to determine the admissibility of confessions. *See* Fed.R.App. 104(c). With all other preliminary matters, the decision to hold proceedings out of the hearing of the jury is left to the trial judge's discretion. We find no abuse of that discretion here.

Memorandum Opinion of the Third Circuit at page 7, plaintiffs' Appendix B, at page 9A.

The Third Circuit correctly held that the trial court's decision to admit the evidence was not in error. Appellate courts will not overturn a court's decision regarding admissibility unless its decision was clearly erroneous. *United States v. Bolla*, 685 F.2d 929 (5th Cir. 1982) (decision not to overturn judge's decision to admit conspirator's statement unless decision was clearly erroneous); *United States v. Brown*, 692 F.2d 345 (5th Cir. 1982) (ruling on admission to be reversed only for clear error).

Given the foregoing, there is little question that the trial court accurately balanced the probative value of the testimony against its potential prejudice in determining the use of same.

The plaintiffs, unwilling to accept the decision of the trial court and two panel determinations by the Third Circuit, have resorted to the argument that the use of a limiting instruction is ineffective and is evidence of a trial court's "abdication" of its responsibilities.

It is well-established that a limiting instruction is an effective and available means for a court to ensure that evidence be viewed in its proper and limited context by a jury. Courts have recognized the limiting instruction as the only vehicle by which to admit valid but potentially prejudicial evidence and ensure a true presentation of all of the facts in a case. As *Weinstein* stated:

> To exclude evidence of mixed admissibility entirely in jury cases would hardly be appropriate since its exclusion might well deny the jury access to facts which are essential for reaching a reasonably accurate decision. To allow its general admission as an alternative to exclusion would, in many cases, preclude the possibility that the trier will base its decision on facts which are rationally probative. Admittedly a compromise, limited admissibility offers an acceptable, if not completely satisfactory means of allowing the trier to consider the maximum amount of evidence with the minimum risk that it will use the evidence improperly.

1 *Weinstein's Evidence*, paragraph 105 [02] (1986).

The plaintiffs attempt to discredit this important mechanism of limiting instruction by quoting *dicta* from past cases with little regard to the context. This belies both the purpose and the spirit of a limiting instruction and is an attempt by the plaintiffs to convince this court that limiting instructions serve no useful purpose nor

are effective. Such an argument put forth by the plaintiffs is absurd. The panels carefully reviewed the lower court's use of the limiting instruction given to the jury, which warned about the non-factual nature of the lay testimony, and found there was no error by the lower court in the use or effectiveness of such instruction.

II. THE APPELLATE COURT CORRECTLY RULED THAT PLAINTIFF HAD NOT PRESERVED ITS FED.R.EVID. 613(a) ARGUMENT FOR APPEAL.

According to the plaintiffs, the panel erroneously held that plaintiffs failed to preserve an objection that no foundation pursuant to Fed.R.Evid. 613(a) had been laid in Capriola, Sr.'s cross-examination. Plaintiffs contend that the panel also erred when it stated that the plaintiffs failed to reassert the objection in its Motion for a New Trial. These arguments are entirely without merit, as can be seen on the record. The pages cited by the plaintiffs in support of their contention that such objections were raised relate *only* to the intended direct testimony of Mark Rychlak, *not* William Capriola, Sr.

On pages 434(a) through 438(a) of the record, cited by the plaintiffs as supporting their argument of both appellate panels' error, the objection and ensuing dicussion relate only to the testimony of Mark Rychlak. The plaintiffs argue that the statement provided to them by defendant's counsel as to the proffered testimony was incomplete or somehow different from that which was disclosed in the defendant's offer of proof. The lower court ruled that defendant had given plaintiff a complete statement, and no testimony beyond the contents of that statement would be permitted. This ruling was proper under the guidelines of Fed.R.Evid. 613(a).

The plaintiffs further assert that they raised their objection to Mr. Capriola, Sr.'s cross-examination in their motion for a new trial. That argument is also

incorrect. Paragraph 3(J) of the plaintiffs' Motion for a New Trial (723A of the record), cited by the plaintiffs, relates *only* to the testimony of Mark Rychlak, and makes *absolutely no mention* of the cross-examination of Capriola, Sr. Thus, both panels were entirely and unequivocally correct when they stated that the plaintiffs failed to show that the objection was raised at trial or reasserted in their Motion for a New Trial. Accordingly, the panels correctly ruled that the plaintiffs had not preserved that objection for appeal.

The plaintiffs also argue they were denied due process when the Third Circuit panel stated that the objection as to Mr. Capriola, Sr. had not been preserved. Did the plaintiffs want the panel to ignore the record and grant reargument? The panel simply could not justify such an extra-judicious holding. The record would not support it. As was patently obvious in the record and in the Third Circuit's memorandum opinion, the objection *had not* been preserved (plaintiffs' Appendix "B" at 8A-9A). The panel, by denying reargument, was reaffirming both the holding of the prior panel and the very record itself.

III. THE THIRD CIRCUIT DECISION NOT TO GRANT ORAL ARGUMENT BY THE PARTIES WAS WELL WITHIN THE COURT'S AUTHORITY AND DISCRETION, AND WAS NOT A DENIAL OF DUE PROCESS TO THE PLAINTIFF.

The plaintiffs assert in their present petition that they were wrongfully denied oral argument by the Court of Appeals. Arguing that they were "short-changed" due to concerns for judicial economy, the plaintiffs insist they had a right to oral argument, which right was "insidiously invaded" (Plaintiffs' Petition, at 47).

Federal Rule of Appellate Procedure 34(a) permits oral argument to be dispensed with when the panel agrees that such argument is not needed.

Fed.R.App.Pro. 34(a). According to the Court of Appeal Rules for the Third Circuit, the criteria for determining whether there should or should not be oral argument are:

> (1) Whether the appeal is frivolous; or
>
> (2) Whether the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) Whether the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Fed. Proc. Rules Service, Court of Appeals, Third Circuit, Rule 12(6)(a).

As can be seen in the rules, there is no absolute right to oral arguments in appeals such as the one at bar. Moreover, the Third Circuit Court of Appeals informed all parties that there would be no oral argument, and the matter would be considered on the basis of the record and the briefs. This was well within the permissible authority and discretion of the court pursuant to the Federal and Third Circuit rules.

Because there is no absolute right to oral arguments within the Third Circuit, all parties have the right to persuade the court to allow such argument. This is provided in the rules where it states:

> Any party to the appeal shall have the right to file a statement within the court setting forth the reasons why, in his opinion, oral argument shall be heard. Such statement shall be filed with the clerk within seven (7) days after the filing of appellee's or respondent's brief. The request shall set forth the amount of argument time required.

Fed. Proc. Rules Service, Court of Appeals, Third Circuit, Rule 12(6)(a).

Despite the plaintiffs' present contentions that oral arguments were necessary, and the decision not to hold

same constitutes a denial of due process, the plaintiffs *did not* make any attempt to obtain oral argument. There was ample opportunity to attempt to persuade the court that the appeal was deserving of such argument, but the plaintiffs chose not to do so. While the reason for not requesting oral argument is unknown to the defendant, it is submitted that it is an opportunity lost. The plaintiffs should not be permitted to use their prior decision not to obtain oral arguments in order to reverse the valid decisions and rulings of both Third Circuit panels.

CONCLUSION

The Third Circuit panels' reviews of the lower court's ruling were carefully and thoughtfully conducted. The panels considered each issue raised on appeal and applied the applicable law. The plaintiffs now attempt to discredit the panels' efforts, as well as those of the trial court. The plaintiffs challenge both the opinions of the court and well-established principles of law, such as the validity of the limiting instructions and the granting of oral argument. The record, applicable law and opinions of the lower court and the two Third Circuit panels demonstrate the defects in the plaintiffs' arguments. Accordingly, this Court should not grant the plaintiffs' Petition for Writ of Certiorari.

Respectfully submitted,

HARVEY, PENNINGTON, HERTING
& RENNEISEN, LTD.

JAMES M. BROGAN, ESQUIRE
NORMAN S. CARR, ESQUIRE
KEVIN F. COX, ESQUIRE
Attorneys for Appellee,
B.F. Goodrich Company